



5001-06-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 204

[Docket DARS-2018-0029]

RIN 0750-AJ76

**Defense Federal Acquisition Regulation Supplement: Contract
Closeout Authority (DFARS Case 2018-D012)**

AGENCY: Defense Acquisition Regulations System, Department of
Defense (DoD).

ACTION: Final Rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal
Acquisition Regulation Supplement (DFARS) to implement sections of
the National Defense Authorization Act for Fiscal Year 2017 and
2018 to permit expedited closeout of certain contracts entered into
on a date that is at least 17 fiscal years before the current
fiscal year.

DATES: Effective **[Insert date of publication in the FEDERAL
REGISTER]**.

FOR FURTHER INFORMATION CONTACT: Ms. Kimberly Bass, telephone
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SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the *Federal Register* at 83 FR 24897 on May 30, 2018, to implement section 836 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114-328), as modified by section 824 of the NDAA for FY 2018 (Pub. L. 115-91), which authorizes the Secretary of Defense to close out certain contracts or groups of contracts through modification of such contracts without completing a reconciliation audit or other corrective action. The authority provided by sections 824 and 836 applies to contracts entered into on a date that is at least 17 fiscal years before the current fiscal year, that have no further supplies or services due, and for which a determination has been made that the contract records are not otherwise reconcilable, because—

- The contract or related payment records have been destroyed or lost; or
- Although contracts records are available, the time or effort required to establish the exact amount owed to the U.S. Government or amount owed to the contractor is disproportionate to the amount at issue.

To accomplish closeout of such contracts, sections 824 and 836 further authorize—

- A contract or groups of contracts covered by these sections to be closed out through a negotiated settlement with the contractor; and
- The remaining contract balances to be offset with balances within the contract or on other contracts regardless of the year or type of appropriation obligated to fund each contract or contract line item, and regardless of whether the appropriation has closed.

When using this authority, the closeout procedures require the contracting officer to issue a modification of the affected contract, which must be signed by both the contractor and the Government. When closing out a group of contracts, the contracting officer must issue a modification of at least one of the affected contracts that reflects the negotiated settlement for the group of contracts and this modification must be signed by both the contractor and the Government. The remaining contracts in the group may be modified without obtaining the contractor's signature.

In accordance with section 836(d)(1) of the NDAA for FY 2017, the Under Secretary of Defense (Acquisition and Sustainment) (USD(A&S)) is authorized to waive any additional provision of law or regulation in order to carry out the closeout procedures as authorized in section 836(a)-(c).

One respondent submitted public comments in response to the proposed rule.

II. Discussion and Analysis

DoD reviewed the public comments in the development of the final rule. A discussion of the comments and the change made to the rule as a result of those comments is provided, as follows:

A. Summary of Significant Changes From the Proposed Rule in Response to Public Comments

1. DFARS 204.804(3)(i)(C) is revised to replace "individual" with "contracting official" to ensure the required determination would be made by a contracting official.

2. DFARS 204.804(3)(iv) is added to implement the authority provided in section 836 to waive provisions of acquisition law or regulation in order to close out contracts in accordance with section 836.

B. Analysis of Public Comments

1. Use of the term "contracting official" versus "individual"

Comment: The respondent recommended a change to the proposed rule text in DFARS 204.804(3)(i)(C) to replace "individual" with "contracting official" to ensure the required determination would be made by a contracting official.

Response: To ensure the contracting officer retains the requisite authority to execute expedited closeouts, the proposed DFARS 204.804(3)(i)(C) text will be revised to: "Has been determined by a contracting official, approved at least one

level above the contracting officer, to be not otherwise reconcilable...."

2. Establish a measure to define disproportionality

Comment: The respondent recommended revisions to DFARS 204.804(3)(i)(C)(2) to establish a measure to define "disproportionate" and to revise the text to reflect a "general rule" of 20 percent to determine "disproportionately excessive".

Response: The text at DFARS 204.804(3)(i)(C)(2) includes the term "disproportionate" to establish that DoD's estimate of time and effort are determined to be greater than the amount owed to a level of imbalance. DoD has concerns that the use of a general measure may become an implied rule. It is not the intent of the DoD to identify a threshold, but to leave the determination of disproportion to the contracting officer's discretion.

3. Include a provision to implement reporting requirement

Comment: The respondent recommended adding a provision to create a template and implement a reporting requirement.

Response: Creation of a solicitation provision is not necessary to implement the requirement for the Secretary of Defense to notify the Congressional defense committees within 10 days of exercising the authority at section 836(d) to waive any provision of acquisition law or regulation in order to closeout contracts under the section 836 authority. Rather, a new

paragraph (3)(iv) is added at DFARS 204.804 regarding the authority, which has been delegated to USD(A&S), to waive any provision of acquisition law or regulation to close out contracts as authorized by section 836 and implemented at DFARS 204.804(3)(i). A reference to internal operating procedures at DFARS Procedures, Guidance, and Information 204.804(3)(iv) is also provided, which direct departments and agencies to forward requests to waive provisions of acquisition law or regulation to the Principal Director, Defense Pricing and Contracting, who will forward the request to USD(A&S), as appropriate.

4. Waiver authority for acquisition laws or regulations necessary for closeout of contracts

Comment: The respondent had concerns over the waiver authority for acquisition laws or regulations necessary for closeout of contracts under section 836(a).

Response: Waiver of acquisition laws and regulations necessary to close contracts must be, under statute, within the parameters of the congressionally granted authority. In accordance with section 836(d)(1) of the NDAA for FY 2017, the USD(A&S) is authorized to waive any provision of law or regulation in order to carry out the closeout procedures as authorized in section 836(a)-(c).

5. DoD 7000.14-R, Financial Management Regulation update

Comment: The respondent recommended updates to the DoD 7000.14-R, Financial Management Regulation.

Response: This rule is implementing in the DFARS sections 836 of the NDAA for FY 2017, as modified by section 824 of the NDAA for FY 2018, to permit close out of certain contracts or groups of contracts. Updating the DoD 7000.14-R is beyond the scope of this rule.

6. Restate FAR 4.804-5(b) requirements for contract closeout actions in DFARS

Comment: The respondent recommended restating required contract closeout actions specified in FAR 4.804-5(b) in DFARS 204.804.

Response: The FAR requirements at 4.804-5(b) are applicable to DoD, as stated in the FAR. Restating the FAR text in the DFARS would be duplicative and is unnecessary.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule does not propose to create any new provisions or clauses or impact any existing provisions or clauses.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select

regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

This final rule is necessary to implement section 836 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114-328), as modified by section 824 of the NDAA for FY 2018 (Pub. L. 115-91). The objective of this rule is to permit expedited closeout of certain contracts entered into on a date that is at least 17 fiscal years before the current fiscal year.

There were no issues raised by the public in response to the initial regulatory flexibility analysis provided in the proposed rule.

This rule will apply to small entities. Using estimates from department and agency subject matter experts, approximately 11,300 contracts subject to this rule need to be closed out by the Government. Of these contracts, the Government estimates that 50 percent, or 5,650, of the awards were made to small businesses.

This rule does not include any new reporting, recordkeeping, or other compliance requirements on any small entities.

DoD has not identified any alternatives that would meet the requirements of the applicable statute.

VII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 204

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR part 204 is amended as follows:

PART 204—ADMINISTRATIVE MATTERS

1. The authority citation for part 204 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

2. Amend section 204.804 by—

a. In paragraph (1), removing “Contracting officers” and adding “Except as provided in paragraph (3) of this section, contracting officers” in its place;

b. In paragraph (2) removing “must” and adding “shall” in its place, and

c. Adding paragraph (3).

The addition reads as follows:

204.804 Closeout of contract files.

* * * * *

(3)(i) In accordance with section 836 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-328) and section 824 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115-91), contracting officers may close out contracts or groups of contracts through issuance of one or more modifications to such contracts without completing a reconciliation audit or other corrective action in accordance with FAR 4.804-5(a)(3) through (15), as appropriate, if each contract—

(A) Was entered into on a date that is at least 17 fiscal years before the current fiscal year;

(B) Has no further supplies or services due under the terms of the contract; and

(C) Has been determined by a contracting official, at least one level above the contracting officer, to be not otherwise reconcilable, because—

(1) The contract or related payment records have been destroyed or lost; or

(2) Although contract or related payment records are available, the time or effort required to establish the exact amount owed to the U.S. Government or amount owed to the contractor is disproportionate to the amount at issue.

(ii) Any contract or group of contracts meeting the requirements of paragraph (3)(i) of this section may be closed out through a negotiated settlement with the contractor. Except as provided in paragraph (3)(ii)(B) of this section, the contract closeout process shall include a bilateral modification of the affected contract, including those contracts that are closed out in accordance with a negotiated settlement.

(A) For a contract or groups of contracts, the contracting officer shall prepare a negotiation settlement memorandum that describes how the requirements of paragraph (3)(i) of this section have been met.

(B) For a group of contracts, a bilateral modification of at least one contract shall be made to reflect the negotiated settlement for a group of contracts, and unilateral modifications may be made, as appropriate, to other contracts in the group to reflect the negotiated settlement.

(iii) For contract closeout actions under paragraph (3) of this section, remaining contract balances—

(A) May be offset with balances in other contract line items within the same contract, regardless of the year or type of appropriation obligated to fund each contract line item and regardless of whether the appropriation obligated to fund such contract line item has closed; and

(B) May be offset with balances on other contracts, regardless of the year or type of appropriations obligated to fund each contract and regardless of whether such appropriations have closed.

(iv) USD(A&S) is authorized to waive any provision of acquisition law or regulation in order to carry out the closeout procedures authorized in paragraph (3)(i) of this section (see procedures at PGI 204.804(3)(iv)).

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